

¹ 5 U.S.C. § 8101 *et seq.*

December 22, 2010. On the claim form he indicated that his injuries resulted from entering and exiting his vehicle while delivering mail. The record indicates that appellant stopped work on December 28, 2010. OWCP developed the claim as an occupational disease or illness claim (Form CA-2), as he was alleging work factors that occurred over more than one workday.²

Appellant submitted an attending physician's report (Form CA-20) dated January 25, 2011 from Dr. Gregory Keese, a Board-certified orthopedic surgeon. Dr. Keese noted right hip pain and low back pain. He diagnosed a lumbosacral herniation, right groin strain, and right hip synovitis. Dr. Keese checked a box marked "yes" that conditions were employment related, writing that the right buttock pain and numbness coincided with repetitive entering and exiting his mail vehicle. He found appellant disabled from work from December 28, 2010 to February 7, 2011.

On February 7, 2011 OWCP accepted lumbar strain, right hip strain, and right groin strain. Appellant returned to part-time work at the employing establishment on February 8, 2011. The time analysis forms (CA-7a) indicate that he generally worked from five to six hours per day. Appellant received intermittent wage-loss compensation through March 30, 2012.

OWCP prepared a statement of accept facts (SOAF) dated February 8, 2011. Appellant was referred to Dr. Joseph Conaty, a Board-certified orthopedic surgeon and second opinion physician for an opinion as to appellant's employment-related condition and work restrictions. In a report dated April 10, 2011, Dr. Conaty provided a history and results on examination. He diagnosed lumbosacral strain, resolving, right hip and groin pain, etiology unclear, and severe long-standing lumbosacral degenerative disc disease with L4-5 spondylolisthesis. Dr. Conaty opined that the job duties resulted in an aggravation of the degenerative disc disease. He indicated that the aggravation should have ceased by April 1, 2011. Dr. Conaty also opined that appellant was disabled for the letter carrier position, but could work with restrictions.

On May 24, 2012 appellant submitted a claim for compensation (Form CA-7) for the period May 7 to 18, 2012. He submitted additional CA-7 forms claiming compensation through September 14, 2012.

In a report dated May 17, 2012, Dr. Philip Yuan, a Board-certified orthopedic surgeon, provided a history and results on examination. The history reported that on April 30, 2012 appellant had been returned to residential delivery duties and he had aggravated his back. After reviewing x-rays dated May 17, 2012, Dr. Yuan diagnosed L4-5 degenerative spondylolisthesis, probable spinal stenosis, and right hip pain likely related to hip osteoarthritis. He indicated in a form report dated May 17, 2012 that appellant was disabled for four weeks. By June 22, 2012 form report Dr. Yuan held appellant off work for six weeks.

OWCP prepared a SOAF dated August 27, 2012 and referred appellant to Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Ha'Eri was

² A traumatic injury is an injury caused by incidents within a single workday or shift. 20 C.F.R. § 10.5(ee). An occupational disease or illness is a condition produced by the work environment over more than a single workday or shift. 20 C.F.R. § 10.5(q).

requested to provide an opinion as to whether appellant had residuals of the accepted lumbar, right hip, and right groin strains, and whether the diagnosed conditions of lumbar spinal stenosis or lumbar spondylolisthesis were causally related to the accepted employment factors. He was also asked to describe any work limitations that were employment related.

In a report dated September 12, 2012, Dr. Ha'Eri provided a history and results on examination. He indicated that appellant complained of low back pain radiating into the right hip. The examination results for the back indicated limitations on range of motion and tenderness to palpation. As to the right hip, Dr. Ha'Eri indicated no pain with hip motion and x-rays showed no abnormalities. He diagnosed resolved industrial lumbosacral strain, resolved industrial temporary aggravation of degenerative lumbar condition, L4-5 grade 1 degenerative spondylolisthesis and degenerative disc disease of L5-S1 associated with spinal stenosis, nonindustrial. Dr. Ha'Eri opined that the lumbar strain had resolved and appellant's lower back symptoms were related to the degenerative lumbar condition. He indicated a lumbar strain would resolve in one or two months. Dr. Ha'Eri then opined that appellant had never sustained a right hip strain, and the hip condition was radicular symptoms from the degenerative spine condition. With respect to the right groin strain, he repeated his statements as to the right hip, and then noted a diagnosis of hernia had been ruled out. As to the diagnoses of spinal stenosis and lumbar spondylolisthesis, Dr. Ha'Eri asserted that the conditions were not medically connected to the employment factors as they were caused by the degenerative preexisting lumbar condition.

Appellant submitted a report dated November 12, 2012 from Dr. Yuan, who reported that appellant remained symptomatic. Dr. Yuan indicated that he had reviewed Dr. Ha'Eri's report and disagreed with the second opinion physician that appellant's condition was purely degenerative and not employment related. He wrote, "I do feel that the patient has served 14 years for the [employing establishment] and his job is quite physically demanding. The physical demands of his job could increase the degenerative nature of the condition and could have helped develop a degenerative spondylolisthesis and spinal stenosis that is symptomatic from now. Therefore, this is a work-related condition." Dr. Yuan indicated that it was difficult to say for sure what caused the conditions, and there was some preexisting disease, but noted that appellant had no prior problems with his back before reporting the injury on December 22, 2010. He reiterated that he felt appellant's job duties at least partially contributed to the diagnosed conditions. Dr. Yuan reported that appellant would continue with modified duties.

In a July 17, 2014 report, Dr. Yuan reported that appellant continued to have back, buttock, and lower extremity pain. He provided results on examination and indicated that x-rays dated July 17, 2014 confirmed spondylolisthesis at L4-5 with L5-S1 disc degeneration. On September 11, 2014 appellant submitted a Form CA-7 claiming a schedule award.

By report dated October 30, 2014, Dr. Yuan reported that appellant had worsening pain in his back, buttocks and down his thigh. He opined, "I believe there is causal relation to [appellant's] work. His job involves frequent bending, twisting, and lifting. The repetitive nature of [appellant's] job has led to advanced degeneration of his back with resulting spondylolisthesis and spinal stenosis." Dr. Yuan requested that the compensation claim be expanded to include the diagnosis of spondylolisthesis and spinal stenosis.

In a decision dated December 16, 2014, OWCP found appellant had not established permanent impairment warranting a schedule award. It indicated that recent reports were discussing nonemployment-related conditions, noting that Dr. Ha'Eri had found the conditions were not work related.

In a second decision dated December 16, 2014, OWCP denied appellant's claim for wage-loss compensation commencing May 7, 2012. It discussed Dr. Ha'Eri's findings and indicated that he represented the weight of the medical evidence.

On December 29, 2014 appellant's counsel requested a hearing on both December 16, 2014 OWCP decisions. A hearing was held on July 7, 2015. Counsel argued that Dr. Ha'Eri's report was of diminished probative value because he refused to accept that appellant had sustained a right hip and groin strains.

In a decision dated September 4, 2015, the hearing representative affirmed the denial of wage-loss compensation commencing May 7, 2012. The hearing representative found Dr. Yuan's reports were of diminished probative value, as it was not established that work activities noted by Dr. Yuan were "frequent" as reported in the October 30, 2014 report. The hearing representative found Dr. Ha'Eri represented the weight of the medical evidence.

In a second decision dated September 4, 2015, the hearing representative affirmed the finding that appellant had not established permanent impairment such as to warrant a schedule award.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under FECA³ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁴

To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁵

Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.⁶ A physician's opinion on the issue of whether there is a

³ *Supra* note 1.

⁴ 20 C.F.R. § 10.115(e), (f) (2005); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁵ *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁶ *See Robert G. Morris*, 48 ECAB 238 (1996).

causal relationship between the claimant's diagnosed condition and the implicated employment factors must be based on a complete factual and medical background of the claimant.⁷ Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors.⁸

ANALYSIS -- ISSUE 1

In the present case, OWCP accepted that appellant sustained lumbar, right hip, and right groin strains as a result of his federal employment as a letter carrier. Appellant returned to part-time work in February 2011 and has claimed wage-loss compensation for total disability from May 7, 2012.⁹

OWCP further developed the medical evidence with respect to appellant's employment-related conditions and disability. In a September 12, 2012 report, the second opinion physician, Dr. Ha'Eri, opined that appellant did not have any continuing employment-related conditions. As to the diagnoses of spondylolisthesis and spinal stenosis, he opined that these were preexisting degenerative conditions unrelated to the employment duties. Dr. Ha'Eri found no employment-related disability.

The attending physician, Dr. Yuan, found appellant was disabled. He specifically addressed the period of disability in question in his reports dated May 17 and June 22, 2012, noting that appellant would be disabled for four weeks and then another six weeks. Dr. Yuan also indicated in his November 12, 2012 report that he disagreed with Dr. Ha'Eri with respect to spinal stenosis and spondylolisthesis. He opined that appellant had spinal stenosis and spondylolisthesis causally related to 14 years of physically demanding work as a letter carrier. Dr. Yuan also submitted an October 30, 2014 report opining that appellant's job duties contributed to spinal stenosis and spondylolisthesis.

It is well established that when there is a disagreement between an attending physician and an OWCP physician, the case should be remanded to an impartial medical specialist to resolve the conflict.¹⁰ There was a clear disagreement between the attending physician and the second opinion physician regarding the diagnosed conditions of spondylolisthesis and spinal stenosis. The referee specialist should be asked to provide an opinion on causal relationship between employment activity and the diagnosed conditions. The Board notes that the hearing representative raised the issue as to the frequency of certain job duties. OWCP should prepare an amended SOAF that clearly describes appellant's job duties and the frequency of certain repetitive motion or activity.

⁷ Victor J. Woodhams, 41 ECAB 345, 352 (1989).

⁸ *Id.*

⁹ The CA-7 claims compensation through September 14, 2012. Dr. Yuan refers to modified duties in his November 12, 2012 report, but it is not clear from the record whether appellant had returned to work.

¹⁰ 5 U.S.C. § 8123(a); Robert W. Blaine, 42 ECAB 474 (1991).

The Board notes that there was no disagreement with respect to the accepted conditions. The issues to be resolved by the impartial referee are whether the conditions of spinal stenosis or spondylolisthesis are employment related, and if so, the period of any disability. After such further development as OWCP deems necessary, it should issue an appropriate decision.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.¹¹ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.¹² For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.¹³ Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of “organ” under FECA.¹⁴

ANALYSIS -- ISSUE 2

With respect to a permanent impairment to a scheduled member or function of the body, there is no probative medical evidence. Dr. Yuan did not provide an opinion that appellant had employment-related permanent impairment. The medical evidence necessary to support a schedule award includes a physician’s report that provides a detailed description of the impairment.¹⁵ The report should include a history of clinical presentation, physical findings, functional history, clinical studies, or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated.¹⁶ The medical evidence of record does not contain a probative medical report as to permanent impairment. The Board notes the second opinion physician, Dr. Ha’Eri, was not asked to address the issue of permanent impairment and did not provide an opinion.

¹¹ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

¹² *A. George Lampo*, 45 ECAB 441 (1994).

¹³ FECA Bulletin No. 09-03 (March 15, 2009).

¹⁴ *See James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20).

¹⁵ *Id.*

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a)(1) (February 2013).

It is appellant's burden of proof to submit evidence that an employment injury contributed to a permanent impairment of a scheduled member or function of the body.¹⁷ The Board finds that the evidence of record is insufficient to establish an employment-related permanent impairment.

Appellant may submit new and relevant evidence to OWCP with respect to a permanent impairment at any time.

CONCLUSION

The Board finds the case is not in posture for decision with respect to an employment-related disability commencing May 7, 2012, and the case is remanded to resolve a conflict in the medical evidence. The Board further finds that appellant has not established a permanent impairment to a scheduled member or function of the body.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 4, 2015 regarding disability commencing May 7, 2012, is set aside and remanded for further action consistent with this decision of the Board. The decision of OWCP dated September 4, 2015 regarding a schedule award is affirmed.

Issued: May 17, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ See A.B., Docket No. 12-1392 (issued January 24, 2013).